

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

JOSEPH M. BILLY and)
SAMANTHA G. ALLEN, by and through)
Her Attorney-In-Fact, NANCY L. BILLY)
1410 McCoy Ave.)
Louisville, KY 40215)

AND)

GREGG M. MURRAY)
2000 Garland Ave.)
Louisville, KY 40210)

3-12-cv-284-S

PLAINTIFFS for Themselves and On Behalf)
Of All Others Similarly Situated)

CLASS ACTION COMPLAINT

VS.)

AND JURY DEMAND

DIAGEO AMERICAS SUPPLY, INC.)
801 Main Avenue)
Norwalk, CT 06851)

SERVE: Corporate Creations Network Inc.)
101 North Seventh Street)
Louisville, KY 40202)

AND)

BROWN-FORMAN CORPORATION)
850 Dixie Highway)
Louisville, KY 40210)

SERVE: Mary E. Barrazotto)
850 Dixie Highway)
Louisville, KY 40210)

AND)

HEAVEN HILL DISTILLERIES, INC.)
1064 Loretto Road)

Bardstown, KY 40004)
)
SERVE: Max L. Shapira)
1064 Loretto Road)
Bardstown, KY 40004)
)
DEFENDANTS)

* * * * *

NOW COME Joseph M. Billy, Samantha G. Allen, by and through her Attorney-in-Fact, Nancy L. Billy, and Gregg M. Murray (“Plaintiffs”), for themselves and on behalf of all others similarly situated, by and through their attorneys, William F. McMurry and Morris & Player PLLC, and state in support of their Class Action Complaint and Jury Demand against Defendants, Diageo Americas Supply, Inc. (“Diageo”), Brown-Forman Corporation (“Brown-Forman”) and Heaven Hill Distilleries, Inc. (“Heaven Hill”) as follows:

NATURE OF THE ACTION

1. This action is necessary to protect the property rights of Plaintiffs and all others similarly situated which have been damaged due to ethanol emissions produced by Defendants.
2. Plaintiffs bring this action on behalf of themselves and all others who have similarly suffered injury to their property as a result of ethanol emissions by Defendants.
3. The reason for not joining all potential class members as Plaintiffs is that, upon information and belief, there are thousands of potential plaintiffs making it impractical to bring them before the Court. All Plaintiffs own real property and/or personal property in the form of motorized vehicles that are situated in neighborhoods which are in the vicinity of Defendants’ ethanol-emitting operations.
4. There are many persons, both in Louisville and in neighborhoods surrounding Defendants’ other facilities around the nation, who have been similarly affected and the question

to be determined is one of common and general interest to many persons constituting the Class to which Plaintiffs belong and the group is so numerous as to make it impracticable to bring them all before the Court, for which reason Plaintiffs initiate this litigation for all persons similarly situated pursuant to FRCP 23.

5. Issues and questions of law and fact common to the members of the Class predominate over questions affecting individual members and the claims of Plaintiffs are typical of the claims of the proposed class.

6. The maintenance of this litigation as a Class Action will be superior to other methods of adjudication in promoting the convenient administration of justice.

7. Plaintiffs and the law firms of William F. McMurry and Morris & Player PLLC will fairly and adequately assert and protect the interests of the Class.

PARTIES AND JURISDICTION

8. At all times material hereto, Defendant Diageo was and is a New York corporation doing business in the Commonwealth of Kentucky that operates an alcoholic beverage distillery and alcoholic beverage warehouse in, among other places, Louisville, Kentucky.

9. At all times material hereto, Defendant Brown-Forman was and is a Delaware corporation with its principal place of business in the Commonwealth of Kentucky that operates an alcoholic beverage distillery and alcoholic beverage warehouse in, among other places, Louisville, Kentucky.

10. At all times material hereto, Defendant Heaven Hill was and is a Kentucky corporation with its principal place of business in the Commonwealth of Kentucky that operates

an alcoholic beverage distillery and alcoholic beverage warehouse in, among other places, Louisville, Kentucky.

11. Plaintiffs Joseph M. Billy and Samantha G. Allen are citizens of Kentucky and at all times material hereto have resided at 1401 McCoy Avenue, Louisville, KY. Nancy L. Billy is also a citizen of Kentucky and resides in the same household and is the Attorney-in-Fact for her daughter, Samantha Allen, who owns the real property at 1401 McCoy Avenue. A copy of the durable power of attorney is attached hereto as **Exhibit 1**.

12. Plaintiff Gregg M. Murray is a citizen of North Carolina and at all times material hereto does and has owned the real property at 2000 Garland Ave., Louisville, KY 40210.

FACTUAL ALLEGATIONS

13. Defendants are companies engaged in the commercial production of alcoholic beverages.

14. As a result of Defendants' operations, including specifically during the aging/warehousing stage of alcoholic beverage production, ethanol emissions occur.

15. The ethanol emissions that occur as a result of Defendants' operations are discharged into the atmosphere.

16. Defendants have not instituted emission control measures to reduce the ethanol emitted during the aging/warehousing stage of its operations.

17. The ethanol emitted by the Defendants' operations is present in and around the Plaintiffs' real and personal property and the real and personal property of others similarly situated in the neighborhoods surrounding Defendants' operations.

18. The growth of the fungus *Baudoinia Compniacensis*, colloquially referred to as “whiskey fungus”, is catalyzed by the presence of ethanol emissions such as those produced by Defendants’ operations.

19. Whiskey fungus accumulates on surfaces in proximity to operations that, like Defendants’ operations, produce ethanol emissions.

20. Whiskey fungus catalyzed by the presence of ethanol emissions such as those produced by Defendants’ operations accumulates on many types of surfaces, including metal, vinyl, concrete and wood.

21. Defendants’ ethanol-emitting operations have caused accumulation of whiskey fungus on Plaintiffs’ real and personal property and the real and personal property of others similarly situated.

22. Whiskey fungus is primarily black and has a “sooty” appearance. The black fungus is very visible on homes, fences and cars and is unsightly.

23. The whiskey fungus caused by Defendants’ ethanol emissions appears as a black stain, black dots, and soot and requires regular cleaning that damages property and precludes Plaintiffs and others similarly situated from the full use and enjoyment of their properties.

24. Whiskey fungus can only be removed with extreme cleaning measures such as a high-pressure washing.

25. As a result of the accumulation of whiskey fungus caused by Defendants’ operations, Plaintiffs and others similarly situated are required to expend an abnormal amount of time and money cleaning surfaces in and around their property, including gutters, siding, fencing and cars.

26. Whiskey fungus and the extreme cleaning methods necessary for its removal cause early weathering of surfaces affected by the fungus.

27. Defendant Diageo distills, ages and/or stores alcohol in Louisville at the distillery located at 3860 Fitzgerald Ave. and at a warehouse facility on Miller Lane in Louisville. These operations emit ethanol into the neighborhoods surrounding these operations, including the Plaintiffs' neighborhoods and the neighborhoods of others similarly situated.

28. Defendant Brown-Forman Corporation distills, ages and/or stores alcohol in Louisville in proximity to its corporate headquarters and at 2921 Dixie Highway in Louisville. These operations emit ethanol into the neighborhoods surrounding these operations, including the Plaintiffs' neighborhoods and the neighborhoods of others similarly situated.

29. Defendant Heaven Hill distills, ages and/or stores alcohol in Louisville in proximity to its Berheim Distillery located at 1701 W. Breckenridge Street. These operations emit ethanol into the neighborhoods surrounding these operations, including the Plaintiffs' neighborhoods and the neighborhoods of others similarly situated.

30. Defendants operate additional ethanol-emitting facilities in other locations within Kentucky and across the nation.

31. At all times material hereto, Samantha G. Allen owned the real property located at 1401 McCoy Avenue, Louisville, Kentucky, which, as a result of Defendants' conduct herein described, accumulates whiskey fungus which causes permanent damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance, and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

32. At all times material hereto, Joseph Billy owned a 2000 Dodge Stratus parked at his residence at 1401 McCoy Avenue, Louisville, Kentucky. As a result of Defendants' conduct herein described, Mr. Billy's vehicle accumulates whiskey fungus which causes permanent damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance, and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

33. At all times material hereto, Gregg M. Murray owned the real property at 2000 Garland Ave., Louisville, KY 40210, which, as a result of Defendants' conduct herein described, accumulates whiskey fungus which causes permanent damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance, and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

CLASS ACTION ALLEGATIONS

34. Plaintiffs bring this class action against the Defendants pursuant to FRCP 23, on behalf of:

- a. All persons who own real property in the vicinity, the exact radius of which is to be determined, of Defendants' ethanol-emitting operations; and
- b. All persons who own motorized vehicles that are regularly parked and/or stored in the vicinity, the exact radius of which is to be determined, of Defendants' ethanol-emitting operations.
- c. Excluded from the Class are the Defendants, their subsidiaries and affiliates, and their officers and directors and members of their immediate families, and any

entity in which the Defendants have a controlling interest, and the legal representatives, heirs, successors or assigns of any such excluded party.

35. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown at the present time, it is estimated that there are thousands of members in the Class.

36. Despite the numerical size of the Class, the identities of the Class members can be ascertained by mapping. Plaintiffs and their counsel do not anticipate any difficulties in the management of this action as a class action.

37. Plaintiffs will fairly and adequately represent the interests of the Class. Plaintiffs are committed to vigorously prosecute this action and have retained competent counsel experienced in class action litigation. Plaintiffs are Class members and have no interests antagonistic to or in conflict with other Class members. Plaintiffs are represented by lawyers who have had extensive experience in prosecuting class actions and will adequately represent the purported Class in this action.

38. This action raises numerous questions of law and fact which are common to the Class members, including:

- a. Whether Defendants knew or should have known of whiskey fungus accumulations in surrounding neighborhoods as a result of ethanol emissions from their operations;
- b. Whether Defendants' use of their property unreasonably interferes with the private use and enjoyment of surrounding properties;
- c. Whether Defendants are liable for nuisance, negligence, gross negligence, trespass or strict liability,

- d. The remedies available to Defendants to prevent ethanol emissions;
- e. The remedies, including the cost thereof, to cure the existing accumulations of whiskey fungus;
- f. Whether the Class is entitled to exemplary damages;
- g. Whether the Class is entitled to injunctive relief.

39. The claims or defenses of the represented parties are typical of the claims or defenses of the Class. Plaintiffs have the same interests as the other Class members in prosecuting the claims against the Defendants. Plaintiffs and all the members of the Class sustained damages as a result of Defendants' wrongful conduct.

40. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Common issues predominate. Furthermore, the expense and burden of individual litigation make it extraordinarily difficult for Class members to redress the wrongs done to them individually.

COUNT I – NEGLIGENCE AND GROSS NEGLIGENCE

41. The foregoing allegations are re-alleged and incorporated herein.

42. Defendants knew or should have known that the ethanol emissions from their operations cause whiskey fungus to accumulate on real and personal property located in proximity to their operations, thereby causing injury to such properties.

43. Defendants have a duty to minimize and prevent the ethanol emissions from entering on to Plaintiffs' property and the property of others similarly situated.

44. As a direct and proximate result of the Defendants' conduct, the property of the Plaintiffs and others similarly situated has been damaged by the accumulation of whiskey fungus which causes permanent damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance and causes unreasonable and substantial annoyance and

unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

45. Defendants' conduct described herein constitutes gross negligence and/or a wanton, willful and reckless disregard for the rights of the Plaintiffs and others similarly situated entitling them to recover punitive damages.

COUNT II – NUISANCE

46. The foregoing allegations are re-alleged and incorporated herein.

47. Defendants' ethanol emissions are a temporary and permanent nuisance as such actions are defined in KRS 411.530, *et seq.*

48. Defendants' ethanol emissions unreasonably interfere with the private use and enjoyment of Plaintiffs' property and the property of and those similarly situated such that it causes unreasonable and substantial annoyance.

49. Defendants have a duty to minimize and prevent the ethanol emissions from entering on to Plaintiffs' property and the property of others similarly situated.

50. As a direct and proximate result of the Defendants' conduct, the property of the Plaintiffs and others similarly situated has been damaged by the accumulation of whiskey fungus which causes permanent damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

51. Defendants' substantial and unreasonable interference with the private use and enjoyment of Plaintiffs' property and the property of and those similarly situated entitles them to punitive damages.

COUNT III – TRESPASS

52. The foregoing allegations are re-alleged and incorporated herein.

53. As a direct and proximate result of the foregoing conduct of Defendants, ethanol emissions and the resulting whiskey fungus from Defendants' operations entered upon, accumulated upon, and physically invaded Plaintiffs' property and the property of others similarly situated.

54. Plaintiffs and others similarly situated did not consent to the ethanol emissions affecting their property.

55. It was reasonably foreseeable that Defendants' failure to properly construct, maintain, and/or operate its facilities could result in an invasion of Plaintiffs' possessory interests.

56. As a direct and proximate result of the Defendants' conduct, the property of the Plaintiffs and others similarly situated has been damaged by the accumulation of whiskey fungus which causes permanent damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

57. The Defendants' actions which resulted in the trespass upon Plaintiffs' land and property were, and continue to be, intentional, willful, and malicious and made with a conscious disregard for the rights and safety of Plaintiffs, entitling Plaintiffs to compensatory, exemplary, injunctive, and punitive relief.

COUNT IV – STRICT LIABILITY

58. The foregoing allegations are re-alleged and incorporated herein.

59. The ethanol emissions from Defendants' operations is unreasonably dangerous in proximity to residential neighborhoods such as those in which Plaintiffs and others similarly situated reside.

60. Defendants' ethanol emissions into Plaintiffs' neighborhoods and the neighborhoods of others similarly situated is not essential to Defendants' operations and, as such, there is no benefit to Defendants' conduct.

61. Defendants have a duty to minimize and prevent the ethanol emissions from entering on to Plaintiffs' property and the property of others similarly situated.

62. Defendants are strictly liable for the unreasonably dangerous ethanol emissions from their operations which caused whiskey fungus to accumulate on real and personal property located in proximity to their operations, thereby causing injury to such properties.

63. As a direct and proximate result of the Defendants' ethanol emissions, the property of the Plaintiffs and others similarly situated has been damaged by the accumulation of whiskey fungus which causes permanent damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance and causes unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

COUNT V – RIGHT TO INJUNCTIVE RELIEF

64. The foregoing allegations are re-alleged and incorporated herein.

65. As a direct and proximate result of the Defendants' ethanol emissions, the property of the Plaintiffs and others similarly situated has been damaged by the accumulation of whiskey fungus which causes permanent damage to the property, an unsightly condition requiring abnormal and costly cleaning and maintenance and causes unreasonable and substantial

annoyance and unreasonable interference with the use and enjoyment of the property, and, as a result of which, the value, value of use and/or the rental value of the property has been reduced.

66. Defendants' ethanol emissions into Plaintiffs' neighborhoods and the neighborhoods of others similarly situated is not essential to Defendants' operations and, as such, there is no benefit to Defendants' conduct.

67. The interests of the Plaintiffs and others similarly situated in protecting their property rights far exceeds the right of the Defendants to continue to emit ethanol during their operations.

68. Plaintiffs and others similarly situated are entitled to a permanent injunction requiring Defendants to reduce ethanol emissions from their operations in residential neighborhoods.

WHEREFORE, Plaintiffs, on behalf of themselves and the putative class members, respectfully demand that the Class be certified, that judgment be entered against Defendants for such amounts as will fairly and reasonably compensate Plaintiffs and the Class for their compensatory damages as may be proven, punitive damages, their costs herein including reasonable attorneys' fees, prejudgment interest, a trial by jury and for all other relief to which they may appear properly entitled.

Respectfully Submitted,

s/ WILLIAM F. MCMURRY
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